



The Attorney General of Texas

December 31, 1982

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Mr. Kenneth E. Graeber
Executive Director
State Property Tax Board
9501 North IH-35
Austin, Texas 78761

Open Records Decision No. 344

Re: Information held by State
Property Tax Board concerning
ad valorem taxation by school
districts

1607 Main St., Suite 1400
Dallas, TX. 75201-4709
214/742-8944

Dear Mr. Graeber:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., as to the availability of certain information collected and compiled by the State Property Tax Board pursuant to section 11.86 of the Education Code.

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The State Property Tax Board is required by the Education Code, section 11.86, to conduct a biennial study to determine the total taxable market value and index value of all taxable property in each school district. The study determines the values as of January 1 of each odd-numbered year, and the board publishes preliminary findings, listing values by district, before September 1 of each even-numbered year, on which date it certifies its findings to the commissioner of education. A school district may protest the board's findings by filing a petition with the board, after receipt of which the board holds a public hearing. If the board decides to change its findings after the hearing, it orders such changes and certifies the changes to the commissioner of education. The board is required to complete all protest hearings and certify all changes before January 1 following publication of its preliminary findings. The findings of the board are utilized by the commissioner of education in determining the local fund assignment under the Foundation School Program. Educ. Code §16.252.

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You have requested our decision as to the availability prior to the September 1 publication of the preliminary findings of value of certain information held by the board. You inform us that it has always been your practice to disclose any and all information in your possession not made confidential by law to any requestor after September 1. Such disclosure permits officials of school districts to obtain all information necessary to prepare a protest before the board of the preliminary findings. One requestor has asked for: (1) the "1981 Work Program for On-Site Review for School District Tax Offices" for all fifteen independent school districts in Dallas County and (2)

"[a]ll documents supporting the Work Program Report cited in Item 1, including, but not limited to, field reports for the various school districts." Another requestor has asked for "the 1981 State Property Tax Board's study, in its entirety, on Panola County." Because the information collected and compiled for each school district is essentially of the same kind, we will combine both requests in this decision.

We note at the outset that section 11.87 of the Education Code sets forth the following:

Sec. 11.87. Confidentiality

(a) All information the board obtains from a person, other than a government or governmental subdivision or agency, under an assurance that the information will be kept confidential, in the course of conducting a study of school district values is confidential and may not be disclosed except as provided in Subsection (b) of this section.

(b) Information made confidential by this section may be disclosed:

(1) in a judicial or administrative proceeding pursuant to a lawful subpoena;

(2) to the person who gave the information to the board; or

(3) for statistical purposes if in a form that does not identify specific property or a specific property owner.

Section 3(a)(1) of the Open Records Act excepts from disclosure "information deemed confidential by law, either [c]onstitutional, statutory, or by judicial decision." Though you do not raise this exception in your request, we must take note of it, see Open Records Decision Nos. 285 (1981); 258, 247 (1980); 226 (1979), and hold that any information subject to section 11.87 may be withheld from disclosure. You do not indicate that any of the material which you provided us as a sample includes any such information; however, if there is information in the requested files obtained pursuant to the confidentiality provision of section 11.87 of the Education Code, that information may be withheld.

You claim that the information requested is excepted from disclosure under section 3(a)(6), which excepts drafts and working papers involved in the preparation of proposed legislation, and

section 3(a)(11), which excepts from disclosure intra-agency memoranda. You further claim that sections 6(1) and 6(5) permit the board to withhold the requested information until the study is completed, or at least until the preliminary findings are published on September 1. Section 6 provides the following:

Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:

(1) reports, audits, evaluations, and investigations made of, for, or by, governmental bodies upon completion;

....

(5) all working papers, research material, and information used to make estimates of the need for, or expenditure of, public funds or taxes by any governmental body, upon completion of such estimates. (Emphasis added).

Your claims under sections 3(a)(6) and 6(1) have already been addressed in a prior decision. In Open Records Decision No. 140 (1976) the predecessor agency of your board, whose responsibility it was to conduct the first study of school districts' taxable value, received a request for the appraisal record information upon which the preliminary findings of value were based. In that instance the request was made, as in this instance, prior to the date on which the preliminary findings were to be published. The custodian of the records claimed that the requested information was excepted from disclosure by sections 3(a)(6) and the then current version of 6(1). With respect to the claim under section 3(a)(6) that the information collected and compiled by the board constitutes "working papers involved in the preparation of proposed legislation," this office declared:

The information requested is factual. It does not reflect policy judgments, recommendations, or proposals. While a comparison, analysis, or other handling of facts prepared to support proposed legislation arguably may be within this exception, we do not believe the exception was intended to keep this kind of basic factual information in the form in which it now exists from the public.

See also Open Records Decision Nos. 248 (1980); 197 (1978). While it is undeniably true that the purpose of the study is to provide the Texas Education Agency with data on which to base recommendations concerning appropriations of state funds for school districts, the

nature of the requested information compiled by the board is factual. It does not reflect "policy judgments, recommendations, or proposals" concerning the drafting of legislation. We therefore conclude that the information requested is not excepted from disclosure by section 3(a)(6).

Open Records Decision No. 140 also considered the argument which you propose, that section 6(1) permits the board to withhold the requested information until the study is completed. Your argument relies upon Attorney General Opinion H-90 (1973), wherein this office declared:

It is our opinion that 'reports, audits, evaluations and investigations' do not become 'public information' until their completion, and that the Act does not require their disclosure in partially completed form.

Section 6(1) of the Open Records Act provides that completed audits prepared by or for governmental bodies "are specifically... public information." Your argument, in effect, is that in light of section 6, reports which are not yet "completed" can never constitute public information. We disagree. Section 6 also provides that "[w]ithout limiting the meaning of other sections of this Act, the following categories of information are specifically made public information." (Emphasis added). And one of the "other sections" of the act, section 3(a), provides that:

All information collected, assembled or maintained by governmental bodies... in connection with the transaction of official business is public information... with the following exceptions only.... (Emphasis added).

Open Records Decision No. 140 departed from the reasoning of Attorney General Opinion H-90 without expressly overruling it. Open Records Decision No. 140 said:

[T]he bulk of the information requested is made up of records upon which the Governor's report will be based, rather than constituting the Governor's report, which is as yet incomplete. That is, the separate field reports on appraisals in various counties appear to be complete in themselves, and even though the information in them may be compiled, analyzed, corrected, adjusted, or otherwise dealt with in a more comprehensive report, the reports requested may be made public in the form in which they now exist. In our view, the requested information constitutes information

which has been collected by the Governor's office and is subject to the Open Records Act. (Emphasis added).

We believe that the approach to the construction of the Open Records Act which was in effect taken in Open Records Decision No. 140 is the correct one. We conclude, in other words, that the threshold question in each instance is whether material or data which is requested from a governmental body constitutes "information collected, assembled, or maintained by [the governmental body] pursuant to law or ordinance or in connection with the transaction of official business." V.T.C.S. art. 6252-17a, §3(a). If it does, the next question is whether it fits within any of the exceptions enumerated in section 3(a) of the act; if it does not come within an exception, it must be released. The fact that information has not yet been put into "final" form is, in other words, not dispositive of whether it must be made available to the public. To the extent that Attorney General Opinion H-90 concludes otherwise, it is hereby overruled.

You also claim that the material is excepted from disclosure by section 6(5), which specifically makes public:

all working papers, research material, and information used to make estimates of the need for, or expenditure of, public funds or taxes by any governmental body, upon completion of such estimates. (Emphasis added).

We believe that the same construction which Open Records Decision No. 140 applied to section 6(1) likewise applies to section 6(5). It does not logically follow, after all, that making specifically public certain reports, audits, etc., upon completion is equivalent to closing such reports, audits, etc., to the public prior to completion.

You finally claim that the information requested is excepted from disclosure by section 3(a)(11), which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency."

We have frequently construed section 3(a)(11) to permit the withholding of advice, opinions, and recommendations contained in inter-agency or intra-agency memoranda. Open Records Decision Nos. 315, 308 (1982); 273 (1981); 239 (1980). You contend that all of the requested information falls within the ambit of this exception. You claim that the requested material fails to achieve the status of being factual until it can properly be designated "preliminary findings which are published by September 1." You state:

The functional completion of the first stage of the study process is the point in that process

when opinion and advice become preliminary findings of sufficient weight to submit to the quasi-judicial process involving protest and appeal to the State Property Tax Board. Until the deliberative process reaches the point of administrative recommendation of values, though preliminary, no agency decision on values assigned exists. These estimates of value are the first factual product resulting from the study procedure. (Emphasis added).

We do not believe that all of the requested material may be so characterized.

You suggest that the board's preliminary findings of value are analogous to the recommendations of value imposed by a chief appraiser, values which become "fact" only after the appraisal review board has placed its imprimatur on them and certified a taxing unit's appraised records. You suggest that the information requested becomes factual only at the point at which it is released as preliminary findings. While it may be accurate to so characterize the board's preliminary findings for purposes of challenging them under the protest procedure set forth in the Education Code, the requested material is not "advice, opinion, or recommendation" for purposes of the Open Records Act. This office has already held that a school tax-assessor's rendition books are open to the public, Open Records Decision No. 76 (1975), as are the business personal property tax renditions filed by taxpayers. Open Records Decision No. 246 (1980). This office so concluded in spite of the fact that in both instances values had not been certified.

This office earlier declared that this exception "[is] designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief concerning administrative action." Attorney General Opinion H-436 (1974). "The exception is based on a recognized privilege from discovery afforded to deliberations or recommendations as to policy." Id. Moreover, it is equally clear that:

[t]he protection afforded by section 3(a)(11) does not... extend to purely factual information, and those portions of an otherwise excepted document which contain factual material must be severed from the remainder and made available to the requestor.

Open Records Decision No. 149 (1976). As a federal court said when construing the Freedom of Information Act counterpart:

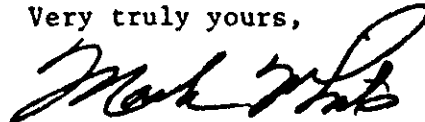
It generally has been accepted that exemption five incorporates the governmental privilege, developed in discovery cases, to protect documents containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated.... [T]he courts have required disclosure of essentially factual material but allowed agencies to withhold documents which reveal their deliberative or policy-making processes.

Mead Data Central, Inc. v. U.S. Department of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

Section 3(a)(11) applies where, as here, the information in question is prepared by outside consultants, rather than employees of the agency. Open Records Decision No. 192 (1978). In Open Records Decision No. 160 (1977), this office declared that an audit report on a federal grantee was subject to disclosure because it was "solely factual and evaluative" and made "no recommendations or suggestions concerning the formulation of policy." See also Open Records Decision Nos. 219, 213, 209 (1978).

We conclude that virtually all of the information here requested is factual, containing no recommendations or suggestions concerning the formulation of policy. With only one exception, none of the material here requested constitutes "advice, opinion or recommendation." That exception consists of a portion of Exhibit B, "Work Program for On-Site Review of School District Tax Offices," which permits a board employee whose responsibility it is to audit a school district tax office to exercise independent, professional judgment in assigning a selected ratio of appraisal which differs from the indicated ratio as determined by his sales ratio study. The figures produced by applying publicly available formulas to the raw data derived from school districts and other outside sources do not represent the deliberative processes which section 3(a)(11) is designed to protect. We conclude that the remainder of the requested information is not excepted from disclosure.

Very truly yours,



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